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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL CHAMU CHAVEZ,

Defendant and Appellant.

G040451

(Super. Ct. No. 07CF2957)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Garrett Beaumont and Gil Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

Using gasoline, defendant started a fire in his home while his girlfriend and her daughter were in an adjacent bedroom. He was found guilty of arson and sentenced to eight years. Defendant argues the court abused its discretion by denying him probation and sentencing him to the upper term. We conclude that defendant's arguments lack merit and affirm.

I FACTS

In August 2007, defendant resided in Santa Ana with his girlfriend, Felipa Adame, her two children, Laura and Fernando,¹ and other members of Felipa's extended family. Including defendant, it appears from the record that at least 10 people lived in the three-bedroom home at the time.

At approximately 11:00 p.m. on August 27, Fernando (who was 16 or 17 at the time) returned from his girlfriend's house to find Felipa upset. Felipa was angry with defendant because he had been drinking, and after arguing, she left the room she shared with defendant and went to her daughter's room. She told Fernando that she and defendant were having an argument and she did not want to stay with him in their room. Felipa told Fernando that defendant had told her that if she left him, he would kill her and himself.

At some point later, defendant began knocking at the window of the bedroom where Felipa was staying with Fernando and Laura. Defendant wanted Felipa to return to the room they shared. Fernando later described defendant's demeanor as "begging." Fernando attempted to calm defendant, telling him that Felipa wanted to sleep now, and would talk to defendant the next day. Fernando noticed that defendant

¹ The first names of the family members are used to prevent confusion. No disrespect is intended. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475, fn. 1.)

had been drinking and smelled like alcohol. Fernando walked with defendant back to his room before returning to his own.

Shortly thereafter, however, defendant went outside again and continued knocking on the window, begging Felipa to return to their bedroom with him. Fernando went back outside and asked him again to stop knocking at the window, telling defendant that he had school the following day and presumably needed to sleep. Defendant responded that he wanted to talk to Felipa.

Fernando again escorted defendant back to his room. When Fernando returned to his own room, he could hear something hitting the wall his room shared with defendant's. Fernando went to defendant's room and attempted to enter, but found the door locked. Fernando, understandably exasperated by this point, went outside to defendant's window and told him, among other things, to stop "bugging my mom." Defendant responded that he just wanted to talk to Felipa. Fernando said that it was not a good idea, and defendant appeared to agree and said he would talk to her tomorrow.

Fernando then joined his uncle and some friends who were on the porch. Shortly thereafter, defendant walked past them and grabbed a gas tank, the type used with lawnmowers, that was next to a palm tree. Defendant walked through the group and took the gas tank to his room. Fernando then observed defendant leave his room and go into the kitchen. Defendant returned to his room holding a barbecue-type lighter.

The next thing Fernando saw, when he went into the living room, was smoke and flames coming from underneath defendant's door. Fernando tried to open the door, but it was locked. Fernando saw flames after he kicked in the door and yelled at his uncle and friends to put the fire out. Felipa heard Fernando yelling that there was a fire, and she and Laura ran out of the house.

Family member Fabian, who had been asleep in another bedroom, woke up and went outside. He saw flames coming from defendant's bedroom, and ran outside for

a water hose. Fernando, meanwhile, ran back outside, and saw defendant looking into a bedroom window. Fernando had called 911, and was on the phone with the dispatcher while walking toward the defendant. Defendant grabbed an apparently empty gallon container and began walking toward the house. Fernando told the 911 dispatcher defendant's name, and defendant immediately jumped a fence and began running. Both Fernando and one of his uncles began chasing after defendant.

Fernando eventually caught up with defendant and waited for his uncle, who was behind, to arrive. Defendant took Fernando's cell phone, which he had been holding, and threw it over a fence. When Fernando's uncle arrived, the two of them caught defendant and Fernando retrieved his phone.

Fire and police personnel eventually arrived, and defendant was arrested. They returned to the house. Defendant was described as unkempt and intoxicated. His eyebrows, mustache and hair were singed. Fernando described the damage to the house, which included burned carpet and damage to a wall.

Anthony Salerno of the Santa Ana Fire Department inspected the premises. He described defendant's bedroom as having a distinct odor of gasoline, and a gas can was found outside the home near the window of the bedroom where the fire had occurred. Salerno determined that an accelerant had been poured on the carpet and ignited. Based on the "pour pattern" in the carpet, Salerno concluded that the fire was not natural or accidental.

On October 24, 2007, the Orange County District Attorney filed an information, charging defendant with three counts. In counts one and two, he was charged with the attempted murders of Felipa and Laura, respectively. (Pen. Code, § 664, subd. (a), § 187, subd. (a)).² In count three, he was charged with arson of inhabited

² Subsequent statutory references are to the Penal Code.

property (§ 451, subd. (b).) During trial, the court granted a defense motion to dismiss count two pursuant to section 1118.1. At the conclusion of trial, the jury found defendant not guilty of count one but guilty of count three. The court subsequently sentenced defendant to the upper term for count three, eight years in state prison.

II

DISCUSSION

Defendant's only grounds for appeal relate to sentencing. He argues that the trial court abused its discretion by denying him probation and sentencing him to the upper term. We address each issue in turn.

Denial of Probation

Respondent argues that defendant failed to preserve this argument for appeal. While defense counsel's objections could have been framed with more elegance, counsel did specifically ask the court to sentence defendant to probation. Therefore, in the interests of justice, we find the argument preserved for appeal.

A grant of probation is an act of judicial clemency, not a matter of right. (*People v. Johnson* (1993) 20 Cal.App.4th 106, 109.) “The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]’ [Citation.] ‘In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.’ [Citation.]” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)

California Rules of Court, rule 4.414,³ address the factors the court should consider when deciding to grant or deny probation. The rule enumerates a number of circumstances relating to both the crime and the defendant, including the seriousness of this crime as compared to other instances of the same offense, the degree of defendant's culpability as an active or passive participant, the vulnerability of the victim, whether the defendant inflicted emotional or physical injury. (Rule 4.414(a).) Facts relating to the defendant include prior criminal record and performance on probation, the defendant's remorse and willingness to comply with probation. (Rule 4.414(b).)

"In deciding whether to grant or deny probation, a trial court may also consider additional criteria not listed in the rules provided those criteria are reasonably related to that decision. (Rule 4.408(a).) A trial court is generally required to state its reasons for denying probation and imposing a prison sentence, including any additional reasons considered pursuant to rule 4.408. (Rules 4.406(b)(2) & 4.408(a).) Unless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice. (Rule 4.409.)" (*People v. Weaver, supra*, 149 Cal.App.4th at p. 1313.)

Defendant argues that his criminal record prior to this incident was insignificant, consisting of 1998 misdemeanor offenses for the possession of a fake resident alien card and for corporal injury to a child. The second conviction involved an incident during which defendant hit his girlfriend's 10-month-old son, apparently resulting in physical injury. Defendant denied any culpability and claimed that he pled guilty to a misdemeanor pursuant to a plea bargain.

³ Subsequent references to rules are to the California Rules of Court.

Defendant was placed on probation, but never formally supervised, because he was released to immigration officials and returned to Mexico. At some point he reentered the United States illegally and did not contact the probation department. According to the presentence report, defendant's prior performance on probation was considered unsatisfactory.

The trial court also found that defendant was minimizing the seriousness of his actions in the instant case. As the trial court noted, this crime was very serious, and only luck and happenstance prevented serious injury or death as the direct result of defendant's actions. As late as the time of the presentence report, defendant adamantly denied that he started the fire or tried to escape afterward. He claimed he was trying to light a cigar when the fire started. Unsurprisingly, the trial court found this explanation wholly incredible, and was disturbed by defendant's failure to take responsibility for his actions.

We therefore conclude the court used valid factors in deciding to deny probation. While it is true that the presentence report recommended probation, the trial court is, of course, not bound by this recommendation, and is free to use its discretion within the bounds of the law. Defendant argues that the court, in effect, resentenced defendant to a felony for the corporal injury prior and substituted its judgment for the jury's with respect to the attempted murder count. This argument is unpersuasive and unavailing. The overall seriousness of defendant's prior criminal acts and the facts of the current case were valid factors to consider in denying probation. (Rule 4.414 (a), (b).)

A court abuses its discretion in sentencing when its decision is so arbitrary or irrational that no reasonable person could agree. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) Cases in which an abuse of discretion have been found include *People v. Bolton* (1979) 23 Cal.3d 208, 216-218, in which the trial judge considered that the defendant's children had been born out of wedlock and received welfare as a basis for

sentencing the defendant to prison. No such irrational grounds are present here. While it is true that the trial court imposed the lengthiest sentence within its purview, defendant has failed to demonstrate that the court was arbitrary or capricious in its decision. Thus, we find no abuse of discretion.

Sentencing Defendant to the Upper Term

The trial court begins the sentencing process with the presumption that the middle term is the appropriate one to impose. “The midterm is statutorily presumed to be the appropriate term unless there are circumstances in aggravation or mitigation of the crime. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 420(a).)” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583.) The sentencing court has “wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in “qualitative as well as quantitative terms” [citation]. . . .” (*Id.* at p. 1582.) Indeed, a trial court may impose an upper term based upon *one* aggravating factor (*People v. Black* (2007) 41 Cal.4th 799, 813), without stating its reasons for “entirely disregard[ing] mitigating factors” (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813).

The court found no mitigating factors present. The aggravating factors the court listed were that defendant’s prior crimes were increasing in seriousness (Cal. Rules of Court, rule 4.421, subd. (b)(2)). This was a fair assessment of the facts. Defendant’s first arrest was in August 1998 for possession of a fake resident alien card, and his second was a few months later for corporal injury of a child. While both were misdemeanors, the second is indisputably a more serious offense. As a single aggravating factor is sufficient to justify the upper term, we find the court did not abuse its discretion by sentencing defendant to eight years.

III
DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

FYBEL, J.